83 - 1529

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FREDERICA ANN ROBINSON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON APPEAL FROM THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Did the Court of Special Appeals of Maryland err in holding that Petitioner's rights under the Sixth Amendment were not violated by the decision of the trial court to sustain objections to two key cross-examination questions?

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OPINION BELOW

The Opinion of the Court of Special Appeals of Maryland was unreported. It was filed on October 26, 1983. A timely Petition for Writ of Certorari to the Court of Appeals of Maryland was filed. It was denied by Order dated January 11, 1984.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Sixth Amendment, United States Constitution, which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ."

2. The statute which is the basis for the Petitioner's remaining conviction, though nothing turns on its

terms, was Section 6, Article 27, Annotated Code of Maryland:

> "Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures any dwelling house, or any kitchen, shop, barn, stable or other out house that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself, or another shall be guilty of arson, and upon conviction thereof, be sentenced to the penitentiary for not more than thirty years."

STATEMENT OF THE CASE

On February 17, 1982, an indictment was returned by a Washington County, Maryland Grand Jury against the Defendant charging the crimes of arson of a dwelling, arson with intent to injure an insurer and attempted arson. All charges were with regard to a fire which occurred in the defendant's home in Hagerstown, Maryland, on the afternoon of October 7, 1980. Following

an evidentiary hearing, the trial court directed a verdict of acquittal on the charge of attempted arson. Following approximately five hours of deliberation, the jury for the Circuit Court for Washington County, Maryland, on September 28, 1982, returned verdicts of guilty on the two remaining charges. On December 16, 1982, the defendant was sentenced to concurrent five year terms in the custody of the Commissioner of Correction, all but eighteen months of the terms being suspended subject to probation. A timely appeal to the Court of Special Appeals of Maryland was noted. By an unreported Opinion filed on October 26, 1983, the Court of Special Appeals of Maryland reversed the conviction of arson with intent to injure an insurer for insufficiency of evidence; however, the conviction under

Article 27, Section 6 (arson of a dwelling) was affirmed. A timely Petition for Writ of Certiorari to the Court of Appeals of Maryland was filed, but denied by Order dated January 11, 1984.

There were no witnesses to the alleged setting of the fire. It was unrefuted that the Defendant left her home at approximately 2:00 p.m. on the afternoon of the fire, no one else being left in the house. It was further unrefuted that the Defendant returned to her house at approximately 5:30 p.m on the same afternoon to find the house surrounded by fire protection equipment and firemen. The Defendant testified and denied any knowledge of how the fire began.

Under Maryland law one element of arson is incendiarism. Indeed, Maryland

recognizes a presumption that a fire is of natural or accidental cause. See, e.g., Hughes v. State, 6 Md. App. 389 (1969).

The only evidence of incendiarism was the expert opinion of James Kittel, Maryland Fire Marshal stationed in Washington County, Maryland. Kittel was qualified as an expert in the cause and origin of fire. He testified that his inspection of the house after the fire revealed no evidence of a natural or accidental cause of the fire. He further testified that, in his opinion, the fire began on a sofa in the living room. He stated that on an end table next to that sofa he found a matchbook with several drops of what appeared to be melted wax. No evidence connected the Defendant to this matchbook or to any candles. Based solely upon this

physical evidence Kittel was permitted, over objection, to testify that in his opinion the fire was started by the placement of a candle among papers on the sofa. He characterized this as a delayed ignition device which permitted the Defendant to "start" the fire before she left the house at 2:00 p.m. on October 7, 1980.

Without question, Kittel's testimony was the cornerstone of the State's case. Absent his testimony, there was no evidence of incendiarism. By virtually any objective evaluation, the factual foundation upon which this opinion rested was a very thin one: the wax on the matchbook cover. Consequently, counsel for the defense intended to demonstrate to the jury that Kittel's professional position and natural inclinations made him a natural

ally with the State, and that he would tend to resolve all doubts in favor of the prosecution. Defense counsel sought to show the jury that Kittel's mind-set shaded his judgment in favor of the prosecution and a finding of incendiarism. To that end, counsel for the defense wanted to explore with Kittel the nature of his job, factors which motivated him in his job, and his natural predispositions. Cross-examination of Kittel was the only vehicle available for such exploration.

Kittel testified that for analytic purposes he, and his profession, placed the causes of fires into three major categories: incendiary, accidental/natural, and undetermined. Any analysis of the cause of a fire begins with it in the third category, undetermined origin. Presumably, even a

lay person could analyze the physical evidence in many fires and identify their origin as being either incendiary or accidental/natural. A professional will utilize his expertise in removing a larger percentage of all fires from the undetermined category. However, to the extent that physical clues or an investigator's skills are lacking, he is not able to transfer a fire from the "undetermined" category into another category. Thus, the number and quality of those fires whose origins are "undetermined" is one measure of the failure rate of the investigator. A perfect investigator would be able to determine the origin of all fires which he investigates; a poor investigator would necessarily leave many fires in the "undetermined" category. Even though the physical evidence was limited

to a single matchbook cover, Kittel had a clear personal interest in removing the fire from the "undetermined" category.

Below is the pertinent excerpt from pages 126-128 of the trial transcript:

> Q. [Defense counsel] Now, Mr. Kittel, I think you have told us that one of the most important portion of your job and responsibilities is to investigate the origin and cause of fires, is that not correct?
>
> A. Yes, sir.
>
> Q. And really then your objective is to identify suspected arsonists, is that correct?
>
> A. Yes, sir.
>
> Q. So therefore, couldn't we conclude that one of the things you try to do in your job is to minimize the number of fires in that undetermined origin category and maximize the number of fires for which you feel you have a suspect?

MS. LEIZEAR [Prosecutor]: Object.

THE COURT: Alright, sustained.

Q. The date of the fire was October 7, 1980, wasn't it?

A. I believe that was the date, yes, sir.

THE COURT: As I understand this question, do you have a preference? Do you try to put all fires in the category that are caused by arson or do you put fires into the category that are caused accidentally or naturally by lightning or something like that?

A. Well, try to put something - I don't like the wording there. We go out and try to determine what happened and when we determine what happens, then it is put in a category, either accidental or incendiary or whatever

Q. Well, would I be correct in saying that some of the primary categories were incendiary or arson or accidental . . .

A. Um-huh.

Q. Natural causes, lightning for example, or would you call that accidental?

A. We have three major categories.

Q. What are they?

A. Incendiary, accidental and undetermined.

Q. Now would it be fair for me to say, sir, that in your job you try to maximize the number of fires you can place in the accidental or incendiary category and minimize the number of fires in the undetermined origin category?

MS. LEIZEAR: Objection.

THE COURT: The objection will be sustained.

The expected answer to either of these two cross-examination questions would have laid the foundation for many subsequent questions having to do with Kittel's bias and the inadequacy of physical clues justifying the

categorization of this fire as incendiary.

ARGUMENT

The issue on appeal is whether the Defendant's constitutional right to confront witnesses against her and her right to cross-examine those witnesses on possible bias was violated when the trial court sustained objections to two key cross-examination questions. The decision of the Maryland Court of Special Appeals misconstrued and misapplied clear Constitutional precedent provided by this Court. Further, the review of this case by this Court will also help to correct inconsistencies between certain Circuits in the application of federal law in this area.

A. The Instant Case

Davis v. Alaska, 94 S.Ct. 1105, 415 U.S. 308, 39 L.Ed. 2d 347 (1974) stands as a clear beacon to guide trial courts in their limitation of cross-examination in criminal cases.

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of the trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalties in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always

> relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence, Sec. 940, p. 775 (Chadbourn Rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S. Ct. 1400, 1413, 3 L. Ed. 2d 1377 (1959). (p.1110)

Davis emphasizes that cross-examination for the detection of possible bias is one of the principal lessons taught by the Sixth Amendment. Indeed, Davis restricts the trial judge's discretion in the limitation of cross-examination to only two grounds: repetition and undue harassment. The Court of Special Appeals disregarded this limitation.

1. Harassment. The cross-examination questions posed by

defense counsel were not designed to harass the witness, nor did they. Indeed, neither the State's Attorney, the trial court, the Assistant Attorney General for the State of Maryland, nor the Court of Special of Appeals of Maryland suggested that the questions were harassing. Thus, one of the grounds for restricting cross-examination clearly is not applicable.

2. Repetition. A review of the transcript, the appellate briefs and the Opinion of the Court of Special Appeals of Maryland reveals nothing to suggest that the first question was repitious of anything which had previously been placed into evidence. A most curious event occurred between the first of the two questions of defense counsel and the second: The trial court interrupted

cross-examination, "sanitized" the essential question, and then permitted Kittel to respond to it. Regarding the second question posed by defense counsel, the Court of Special Appeals of Maryland in its concluding paragraph on the subject says:

> In short, defense counsel got an answer to his question, although it was not the one he wanted. When he asked essentially the same question the second time, the objection was properly sustained, because the question had already been answered. (A-8)

Thus, Maryland has apparently adopted a new standard for the cross-examination of the State's witnesses: The trial court may refuse to permit a witness to answer a cross-examination question, then paraphrase that question and elicit an answer to it, and then refuse to permit defense counsel to follow up on the

question. This is a most curious juxtaposition of the "right of an accused" to confront the witnesses against him. It is a gross misconstruction of the purpose and spirit of cross-examination. Cross-examination is not supposed to be polite cocktail party conversation, nor is it supposed to be a pro forma exchange of abstract information. Rather, it is the defendant's opportunity to aggressively confront an adverse witness, and perhaps through the pressure and vitality of that confrontation expose to the jury attitudes and predispositions which the witness himself might not readily admit.

Consider the question put to Kittel by the trial court; it basically was, "Are you biased?" There can be no doubt but that the Judge and the State's

Attorney and the defense counsel all would have fallen off their chairs had the witness admitted a bias. It can hardly be contended that such a sterile question, pleasantly asked by the Judge, can fit as a substitute for the spirited questioning of that witness by counsel for the Defendant. Thus, it is clear that the questions put forth by defense counsel were not repetitious and thus they do not fit into the second ground which the Court in Davis cites as a basis for the exercise of the trial court's discretion.

3. Foundation. Inasmuch as the Court of Special Appeals of Maryland had no Constitutionally approved basis for affirming the decision of the trial court on this issue, the final ground to which they looked must also be examined. At page A-7 of the Court's Opinion it is

suggested that a proper foundation for the questions had not been laid because there had been no prior evidence with regard to the criteria upon which Kittel's job performance was evaluated. The answer to this claim is rather simple: First, one would no more expect Kittel to admit that his job performance was rated according to this criterion than one would expect a police officer to admit that he had a "quota" for speeders to be arrested on a given day. Second, the trial court must not have felt that there was an improper foundation because it asked the same question, albeit it in a sterilized form. Third, this analysis puts the cart before the horse: defense counsel was trying to get Kittel to admit a natural inclination to not categorize fires as "undetermined origin", and with that as

a foundation defense counsel would have then sought answers showing that such a pattern of job performance would be favorably viewed by Kittel's supervisors.

There was no acceptable reason for the trial court to cut off this line of questioning. Bias is always relevant. The questions were not harassing. The questions were not repetitions. There was a foundation.

Simply put, the trial court failed to grasp the breadth of the Defendant's Sixth Amendment right to cross-examination. That right includes the opportunity to explore any possible source of bias. This Court's application of this principle to the facts in Davis is most useful in its comparision to the instant facts:

> . . . defense counsel sought to show the existence of possible bias and prejudice

of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner.

We cannot speculate as to whether the jury, as sole judge of credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to put on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.' Douglas v. Alabama, 380 U.S. at 419, 85 S. Ct., at 1077 . . . .

We cannot accept the Alaska's Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of

> impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "re-hash" of prior cross-examination. (p.1111; emphasis in original)

Contrasted with Davis, defense counsel was not even permitted to ask the witness whether he was biased; the trial court usurped the questioning. Defense counsel was certainly denied the opportunity to explore why the witness might have been biased. Defense counsel was denied the chance to elicit facts and admissions on which he might base a jury argument that Kittel was predisposed to not place fires in the "undetermined origin" category.

Consider that Kittel's opinion was the sole evidence of incendiarism. Consider that the wax on the matchbook cover was the sole fact upon which Kittel based his opinion of incendiarism. Consider that the jury deliberated approximately five hours before returning a verdict. There can be little doubt that any viable evidence of Kittel's bias might well have produced a verdict of not guilty.

B. Conflict Among Circuits

A conflict presently exists among many of the Circuit Courts of Appeal as to the standard to be used in applying the Davis doctrine to issue of witness bias.

In two cases, United States v. Tracey, 1 Cir., 675 F. 2d 433 (1982) and Niziolek v. Nashe, 1 Cir., 694 F. 2d 282 (1982), the First Circuit has adopted

what might be called the "sufficient other information" test of whether the trial judge improperly limited cross-examination of bias. Although noting that the defendant should be permitted wide latitude in the search for witness bias, especially in the cross-examination of the government's more important witnesses, the First Circuit has nonetheless taken a stand which limits the breadth of information which can be brought to the jury's attention. The First Circuit seems to be suggesting that if some evidence has been introduced as to the witness' bias, the trial court can limit the overall quantum of such evidence and exercise its discretion by restricting other cross-examination testimony (not necessarily repetitive) which may show the degree or depth of that bias.

In Tracey the First Circuit found that the trial judge had not abused his discretion in preventing the defendant from cross-examining a witness concerning the fact that the witness had been arrested for drunkenness and his bail posted by the United States attorney. The Court noted that abundant other testimony of the witness' possible bias had already been presented.

In Niziolek the First Circuit reiterated its position in Tracey. Defense counsel had been permitted to elicit testimony from government witnesses that each of them was awaiting sentencing. Defense counsel was also permitted to question one of them as to his motive for turning himself in to the police. The trial court at that point cut off additional cross-examination on bias. Unfortunately, the reported

opinion does not describe the additional questions for which the defendant was denied answers.

In United States v. Vasilios, 5 Cir., 598 F. 2d 387 (1979) the Fifth Circuit apparently adopted the same "sufficient other information" standard that has been adopted by the First Circuit. There the defense had shown that the witness was testifying pursuant to a police agreement and that he (the witness) and the defendant had had frequent conflicts over management of their jointly owned business. Apparently believing this to be sufficient indication of bias, the trial court refused to permit defense counsel to ask the witness whether he knew that the defendant was planning on testifying against the witness in another, separate

criminal action. The Fifth Circuit affirmed the trial court.

The position of the First and Fifth Circuits stands in contrast to the positions adopted in the Sixth and other Circuits. The Sixth Circuit in United States v. Leja, 6 Cir., 568 F. 2d 493 (1977) demonstrated the stark difference between its standard and the "sufficiency of other evidence" standard. In this drug distribution case the defense counsel had not been permitted to ask the amount of payment which an informant had received for other work which he had done for the Government. The trial judge had permitted voluminous evidence of the payment which the informant received for his work on the defendant's particular case, including the fact that he was on a weekly salary and received "bonus

payments" for the arrest of this and other defendants. Abundant evidence was presented that the witness' relationship to the Government as an informant had been a long-term, and well-paying one. The Sixth Circuit, however, found that that was an insufficient basis for denying defense counsel the opportunity to learn the informant's total Government compensation. The Court held that the jury was entitled to hear all evidence about payment of the informant in order to develop its own determination of the witness' bias. See also United States v. Pritchett, 6 Cir., 699 F. 2d 317 (1983), another Sixth Circuit case in which the trial judge was found to have been abused his discretion by the improper denial of cross-examination questions.

For other cases in which the Circuit Courts have reversed the trial court's restriction of cross-examination see Chipman v. Mercer, 9 Cir., 628 F.2d 528 (1980); United States v. Lindstrom, 11 Cir., 698 F. 2d 1154 (1983); and Chavis v. State of North Carolina, 4 Cir., 637 F. 2d 213 (1980).

CONCLUSION

The judgment below deprived the defendant of her Sixth Amendment right to effectively cross-examine the key State witness. This Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted

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